

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

**In re: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION**

MDL No. 15-2666(JNE/FLN)

**This Document Relates to:
Spaich, 0:16-cv-04360-JNE-FLN**

**RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO COMPLY
WITH PRETRIAL ORDER NO. 14**

Counsel for Plaintiff Randall Spaich (hereinafter “Mr. Spaich”) submit this Response to Defendants’ Motion to Dismiss for Failure to Comply with Pretrial Order No. 14. While counsel do not oppose the Defendants’ Motion, they seek to provide this Honorable Court with reasons regarding why Mr. Spaich’s Plaintiff Fact Sheet (PFS) has not been timely submitted.

Mr. Spaich’s claim herein was filed December 27, 2016. On December 29, 2016 counsel mailed Mr. Spaich the PFS to fill out and return. On January 5, 2017, a reminder letter was mailed out to Mr. Spaich, along with a medical records authorization form for him to execute and return. Having not received Mr. Spaich’s PFS sheet, counsel sent Mr. Spaich another letter with another copy of the PFS for him to fill out and return on February 3, 2017.

On or about March 21, 2017 Mr. Spaich was contacted by phone, having not yet returned his PFS, and he indicated he did not want to proceed further with the claim. Counsel did not request an extension to file the PFS due to plaintiff’s stated desire to dismiss his claim.

On March 27, 2017 counsel sent Mr. Spaich correspondence memorializing the phone call in which Mr. Spaich indicated he did not want to pursue his claim. Additionally, this correspondence detailed the consequences of Mr. Spaich's decision to dismiss his claim with prejudice. Specifically, the correspondence advised:

“...there are significant legal consequences to your decision not to pursue the case and your specific instruction to me to dismiss your pending case. Once your case is dismissed, likely a dismissal with prejudice, you will forever be barred from reasserting a claim for past or future damages/losses against the Bair Hugger defendants. To be clear, once the case is voluntarily dismissed with prejudice, that action cannot be reversed. ...”

Further, Mr. Spaich was asked to return the correspondence with his signature acknowledging his decision to dismiss his claim with prejudice.

Mr. Spaich did not return the signed document authorizing a dismissal of his case, so counsel sent another letter, certified, on June 7, 2017 again memorializing his verbal indication that he did not want to pursue the claim, detailing the legal consequences of his decision and requesting he acknowledge his decision in writing. Though counsel never received the written acknowledgment of dismissal from Mr. Spaich, counsel did receive the “green card” indicating that Mr. Spaich did receive the certified mailed correspondence. (See attached Exhibit A)

Additionally, on June 19, 2017 counsel sent Mr. Spaich another letter, via Fed Ex 2 day delivery, reiterating the prior attempts made to contact him as well as the consequences of his failure to respond and of his stated desire to dismiss his claim. Fed Ex confirmed the correspondence was delivered. (See attached Exhibit B)

To date, counsel have received neither Mr. Spaich's completed PFS sheet, nor the written/signed acknowledgment of his verbal request to dismiss his claim.

Dated: July 11, 2017

McGLYNN, GLISSON & MOUTON

By: /s/Benjamin P. Mouton
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**L.R. 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE REGARDING
PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

This response complies with the word limitation of LR 7.1(f) and LR 7.1(h) because this response contains 503 words, including all text, headings, footnotes, and quotations, save those parts exempted pursuant to LR 7.1(f)(1)(C). This response was prepared with Microsoft Word Perfect Office X7.

This response complies with the type size requirements of LR 7.1(h) because this response has been prepared using 13 point font, is doubt spaced save the headings, footnotes and quotations exceeding two lines, and is submitted on 8 1/2" x 11" paper with one inch margins on all sides.

Dated: July 11, 2017

McGLYNN, GLISSON & MOUTON

By: */s/Benjamin P. Mouton*
BENJAMIN P. MOUTON #20305
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SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Randall Spain
24617 E. Saratoga Pk
Aurora, CO 80016
Attn: Miss S Spain

2. Article Number

(Transfer from service label)

7017 0660 0000 5403 5060

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

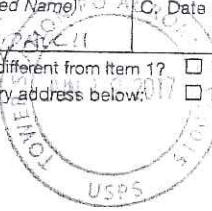
A. Signature

X R. Spain

Agent
 Addressee

B. Received by (Printed Name) A C. Date of Delivery

Randy J Spain

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type

<input type="checkbox"/> Certified Mail	<input type="checkbox"/> Express Mail
<input type="checkbox"/> Registered	<input type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Insured Mail	<input type="checkbox"/> C.O.D.

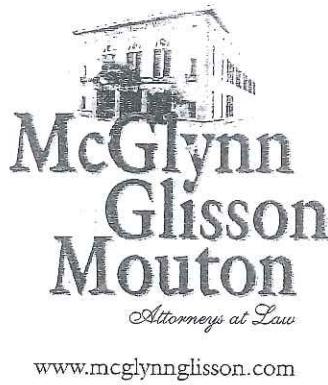
4. Restricted Delivery? (Extra Fee)

Yes



Daniel J. McGlynn
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June 19, 2017

VIA FED EX 2-DAY DELIVERY

Randall Spaich
24617 E. Saratoga Pl.
Aurora, CO 80016

Re: Bair Hugger Infection/Injury Claim

Dear Mr. Spaich:

You retained our law firm on January 15, 2016 to represent you on a claim for personal injury resulting from the use of a Bair Hugger Forced Air Warming Blanket during your April 2015 surgery of your hip/knee. After confirming that a Bair Hugger device was used during your surgery, we filed a lawsuit on your behalf on December 27, 2016.

My office has sent you several letters (January 5, 2017, March 27, 2017 and June 7, 2017) requesting that you return the completed Plaintiff Fact Sheet (PFS) relative to this matter. However, despite my letters, multiple phone calls and emails I have received no response from you. I personally called you last week and left a voicemail message for you and I emailed your wife. Both the phone call and the email have gone unanswered.

In this regard, I have no choice but to advise the defense attorneys and the MDL judge that you have been unresponsive to us in this matter and that we are unable to file the court-ordered PFS on your behalf. As a result of your unresponsiveness, the defendants will eventually file a motion with the court to dismiss your claim and I have no legal basis to object to their motion.

Please allow me to be clear once again that once your case is voluntarily dismissed with prejudice that action cannot be reversed. As such, I trust you have given serious thought and consideration to your decision not to respond to our multiple requests for information.

Certainly should you have any questions or if you decide to reconsider in the next day or two, please do not hesitate to contact me. This will be your last notice on your pending case unless I hear from you as soon as possible.



Randall Spaich
June 19, 2017
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With kind regards, I am,

Sincerely,



Benjamin P. Mouton

BPM/ka



July 11, 2017

Dear Customer:

The following is the proof-of-delivery for tracking number 811592030577.

Delivery Information:

Status:	Delivered	Delivered to:	Residence
Signed for by:	Signature not required	Delivery location:	CO
Service type:	FedEx 2Day	Delivery date:	Jun 21, 2017 13:37
Special Handling:	Deliver Weekday		
	Residential Delivery		

NO SIGNATURE REQUIRED

Proof-of-delivery details appear below; however, no signature is available for this FedEx Express shipment because a signature was not required.

Shipping Information:

Tracking number:	811592030577	Ship date:	Jun 19, 2017
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Recipient:	Shipper:
CO US	BATON ROUGE, LA US

Reference	SPAICH BAIR HUGGER
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Thank you for choosing FedEx.